Editor's note: 97 I.D. 11; Reconsideration granted, decision reaffirmed -- 116 IBLA 176, 97 I.D. 239 (Sept. 26, 1990); Petition for review by Director granted, decision reversed in part -- 9 OHA 68 (July 10, 1991), 98 I.D. 248

FOREST OIL CORP.

IBLA 87-580 Decided January 30, 1990

Appeal from a decision of the Director, Minerals Management Service, affirming assessment of additional royalty and late payment charges. MMS-85-0326-OCS and MMS-86-0096-OCS.

Affirmed in part, set aside in part, and remanded.

1. Federal Oil and Gas Royalty Management Act: Royalties--Oil and Gas Leases: Royalties: Payments--Outer Continental Shelf Lands Act: Oil and Gas Leases

   A royalty payor who has been assigned the duty to make royalty payments for production from an oil and gas lease on behalf of co-lessees and who has notified MMS of acceptance of this responsibility by filing a payor information form may be held liable for royalties due under the terms of the lease.

2. Federal Oil and Gas Royalty Management Act: Royalties-- Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: Oil and Gas Leases

   A decision issued to the payor after audit regarding valuation of natural gas produced from certain leases asserting the gas sold was not priced in

accordance with the statutory ceiling price may be set aside and remanded where the record fails to indicate the affected lessees were apprised of the basis of the revised valuation and afforded an opportunity to respond as required by the lease terms.

113 IBLA 30

3. Federal Oil and Gas Royalty Management Act: Royalties--Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: Oil and Gas Leases--Outer Continental Shelf Lands Act: Refunds

In the context of an appeal from a decision of MMS after audit assessing additional royalty on production from an oil and gas lease the issue is what, if any, additional royalty is due and owing to the lessor. The Board adheres to its holding in Shell Oil Co., 52 IBLA 74 (1981), and Mobil Oil Corp., 65 IBLA 295 (1982), that where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit.

APPEARANCES: Douglas B. Glass, Esq., Mary Nell Browning, Esq., Houston, Texas, for appellant; Howard W. Chalker, Esq., Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Forest Oil Corporation (Forest) has brought this appeal from a decision of the Director, Minerals Management Service (MMS), dated January 30, 1987. In that decision, the Director affirmed the assessment of additional royalties and late payment charges on production from offshore oil and gas leases.

This case arose from an MMS audit of Forest's royalty payments on production from Federal oil and gas leases from January 1977 through December 1983. The scope of the audit included payments made by Forest in its own behalf as lessee and on behalf of other working interest owners as operator

and agent. In a November 8, 1985, letter responding to appellant's comments on the February 1985 draft audit report, the Associate Director of the Royalty Management Program (RMP) confirmed the intent of MMS to hold appellant responsible for additional royalty payments due from other working interest owners as well as the intent to require payment of royalties which were the subject of alleged unauthorized recoupments. Forest appealed this

decision to the Director, MMS, where the case was docketed as MMS-85-0326-OCS.

Subsequently, as a result of the audit, the Lakewood Regional Compliance Office, RMP, MMS, billed Forest for additional royalties and late payment charges in the amount of $2,868,517.88 in an undated demand letter. 1/ This demand for payment was appealed to the MMS Director under docket number MMS-86-0096-OCS.

In upholding the assessment of $2,595,925.71 in challenged offshore royalties and late payment charges, 2/ the Director addressed two major

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1/ The only copy of the demand letter appearing in the file is attached to Forest's appeal to the Director. Although the letter is undated, Forest states that it received the demand letter on Jan. 14, 1986.

2/ The Director's decision indicated that of the $2,744,159.57 assessed for offshore leases, Forest paid $148,233.96 and appealed the balance of $2,595,925.71 (Director's Decision at 2). The assessment was itemized in the Director's decision as follows:

Audit Report Finding	Description	Amount Appealed
1.a)	Disallowed Overpayment and Duplicate Payments	$1,273,254.73
1.b)	Incorrect Pricing	208,595.47
1.c)	Unreported Sales	81,901.19
1.d)	Incorrect Volumes	162,459.56
1.f)	Incorrect Value	20,851.93
6.a)	Late Payment Charge Analysis - Detailed Review	798,015.26
6.b)	Late Payment Charge	

Analysis - Estimated Gas	50,847.57
	$2,595,925.71

issues. The first question is whether additional royalty is due because Forest improperly recouped royalty overpaymen offshore leases by entering an offsetting credit on subsequent monthly reports in violation of refund procedures mandate section 10 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1339 (1982). 3/ The second issue is whether M may hold the payor of an offshore oil and gas lease responsible for payment of royalties attributable to the other wor interest owners.

With respect to the recoupment of the royalty overpayments on subsequent monthly reports, the Director held recoupment of an overpayment on an Outer Continental Shelf (OCS) lease through entries to Form MMS-2014 is barred i absence of prior approval from MMS. The decision contended that a fully documented refund request must be file conformity with the requirements of section 10 within 2 years of the overpayment. The Director distinguished the dec in Shell Oil Co., 52 IBLA 74 (1981), upholding the offsetting of underpayments against overpayments discovered durin audit period where the audit was conducted more than 2 years after the date of the overpayments on the ground that the "2- period had not run at the time Forest discovered the alleged overpayments" (Decision at 5). The Director found that the 2- limit under section 10 applies to credits, including recoupments.

3/ Section 10(a) of OCSLA provides in pertinent part:

"[W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United Stat connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess sha repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed wit Secretary within two years after making of the payment * * *."

43 U.S.C. § 1339(a) (1982).

Regarding the contention of Forest that it should not be responsible for that portion of the royalty underpayn attributable to the interest

of other lessees, the Director found that co-lessees are joint venturers and, as such, are properly held jointly and severally l for the royalty obligation. The Director also held Forest was responsible as an agent for the other lessees in view c completion of an MMS payor information form (PIF) and assumption of the duties of royalty payor. The Director noted Forest was the designated operator of the Eugene Island Block 292 Unit and had fractional interests in unit leases. In sup of his decision, the Director noted the obligation of Forest under section 8 of the Unit Agreement to pay all royalt production of unitized substances for the leases to which the production was allocated. Hence, the Director concluded F had a contractual obligation to report and pay royalties on behalf of the other lessees.

Several major issues are raised in the statement of reasons for appeal filed by Forest. The first question is whethe royalty payor is liable for the royalty deficiencies of other lessees. Another critical issue raised is whether overpayn recouped by "adjustments" taken on Form MMS-2014 without prior approval for the purpose of reconciling royalty payn with actual production figures are properly recognized as an offset to underpayments of royalty disclosed by an audit. A re question is whether a recoupment taken on Form MMS-2014 without prior approval for the purpose of reconciling ro payments with actual production may be considered as an application for refund of overpayments when such adjustment taken on a lease-by-lease basis within the 2-year limitation period.

Finally, appellant contends royalties are not properly based on the relevant Natural Gas Policy Act (NGPA) category ce price without regard to other factors.

Forest argues that there is no statutory support in either OCSLA or the Federal Oil and Gas Royalty Managemen of 1982 (FOGRMA), 30 U.S.C. §§ 1701-1757 (1982), for holding the royalty "payor" liable for the royalty share of working-interest owners where the other lessees have marketed their own gas and computed the royalties due on that ga Appellant also asserts that it is not legally responsible for the royalty payments of the other lessees based on its statu "operator," apart from its role as "payor." Forest contends that the Designation of Operator Form 9-1123 authorize operator to act as the agent of the lessee, but by its express terms neither constitutes an assignment of an interest in the nor relieves the lessee from liability for compliance with the terms of the lease. Further, appellant argues that holding the p liable for the royalty underpayments of other lessees in circumstances such as these will cause lessees to refuse to assum role of single payor for several lessees. Hence, Forest contends the principle of administrative convenience is not serve automatically holding the payor liable.

4/ Forest stated in its notice of appeal to the Director, MMS, dated Nov. 25, 1985, that each of the other lessees took its s of the gas produced from the OCS leases in which it held an interest and marketed the gas under a gas purchase contract its own buyer (Notice of Appeal at 3). Further, Forest indicated that the buyers made payment directly to the respe lessee/seller who had the responsibility for setting the price and calculating the royalty due. The lessees then forwarde royalty due to Forest who then paid MMS a lump sum royalty for all production from the leases (id. at 3-4).

With regard to the issue of offsets or recoupments taken on Form MMS-2014, Forest contends the recoupment not an attempt to subvert the refund procedures under OCSLA, but, rather, are adjustments to royalty payments consistent with the Board's decisi Shell Oil Co., supra. Forest asserts that the fact that the overpayments were discovered within 2 years, in time for fil refund application under OCSLA, does not distinguish this case from Shell because the adjusting underpayments were m within 2 years of the overpayment in both cases and the subsequent audits revealed only that the Department had not acce the use of the adjustment procedures. Appellant contends there is no viable distinction between offset and recoupment in context. In the alternative, Forest argues that it has already applied for refund of royalty overpayments through the adjustm claimed on Form MMS-2014 which detailed in writing the lessee, the amount of any overpayment offset, and the lease to w the offset was applicable. Forest asserts these recoupments were filed within 2 years of the overpayment, thus qualifyin consideration as timely applications for a refund.

Finally, appellant challenges the assertion in the audit report of the right to calculate royalty on the NGPA ceiling without regard to the price received by the lessee under arm's-length sales contracts. Forest asserts that royalty is ordin calculated on the basis of the price received by the lessee in the absence of special circumstances, which do not exist in case.

In answer to Forest's statement of reasons for appeal, MMS contends before the Board that appellant's recoupme royalty overpayments by taking offsets on subsequently filed monthly reports (Form MMS-2014) without MMS appr violated section 10 of OCSLA, 43 U.S.C. § 1339 (1982), governing refunds of overpayments. MMS contends that For not entitled to claim offsets for the overpayments involved because, unlike the situation in Shell Oil Co., supra overpayments were discovered within 2 years when an application for refund was still an available remedy. 5/ MMS ar that the recognition of offsets for underpayments and overpayments within the audit period which have been disclosed b audit conducted after the close of the period for filing a refund request "does not authorize unilateral credit adjustment recoupments."

Regarding the liability of Forest for the royalty obligation of other lessees, MMS notes that appellant was the ope for the leases at issue and cites the portion of the unit agreement in the file, cited in the Director's decision, providing royalty shall be paid by the unit operator. MMS asserts that this responsibility for royalty payment qualifies Forest as a "les under the definition in section 3 of FOGRMA, 30 U.S.C. § 1702(7) (1982), embracing persons assigned the obligation to r royalty payments under the lease. In further support of its conclusion, MMS has cited several Federal court opinions invol Department of

5/ Thus, MMS disagrees with appellant's understanding of the factual context of the Shell case and asserts that the less Shell was not aware of the overpayment until the audit when the underpayment was disclosed, well after the lapse of tir which to file a refund request.

Energy crude oil pricing regulations and Federal Power Commission regulations where the operator was held respon without resort to all of the different lessees. Further, MMS argues that appellant assumed the responsibility to make ro payments for the other lessees when it filed a PIF with MMS and was assigned a payor code number, thus assuming the s of a payor.

With respect to appellant's assertion of error regarding the assessment of royalty on the basis of the NGPA ceiling without regard to the price received by the lessee in arm's-length sales, MMS contends Forest is precluded from raising argument before the Board by the failure to raise the issue before the Director. MMS further asserts that Forest paid its s of the assessment relating to this issue, citing an MMS Field Report dated May 19, 1986, for docket number MMS-86-0 OCS. 6/ In any event, MMS argues that royalty valuation is not necessarily limited to the actual proceeds received and the regulated price is a relevant factor under the royalty valuation regulation. Finally, MMS contends Forest is responsibl the late payment charges in connection with the additional royalties assessed.

[1] The issue of the liability of the royalty payor for the share of royalty due on production attributable to the inte of other lessees is a matter of first impression before this Board. The lessee, as the owner of

6/ A search of the record submitted to the Board has failed to disclose a copy of the cited document. Even if it is assumed Forest has paid its share of this item of the royalty assessment, the asserted liability of Forest for the share of the other les would preclude dismissal of this issue for mootness.

the working interest in production, is liable to the lessor under the terms of the lease contract for the royalty on oil and produced. 7/ The same is true of any approved assignee of a record title interest in the lease. It appears from the record appellant shared a working interest in each of the leases with other lessees and, further, that appellant had assumed responsibility of making royalty payments for the co-lessees pursuant to the unit agreement. 8/ Offshore oil and gas agreements are generally required to conform to a model unit agreement. 30 CFR 250.192(b); 250.193(a). Under the t of the model unit agreement, the operator is required to pay production royalties. 30 CFR 250.194. In order to fulfil responsibility for making the royalty payments, appellant filed a PIF with MMS. Thus, the question is whether appell assumption of the status of royalty payor is sufficient to impart liability for royalty due on behalf of other working int owners.

In resolving this issue we find certain statutory provisions relevant. Under section 3 of FOGRMA, the term "les is defined to include "any person to whom the United States, an Indian tribe, or an Indian allottee, issues a lease, or any pe

who has been assigned an obligation to make _____

7/ Further, a lessee may designate an operator to act for the lessee in matters relating to lease operations, but this doe relieve the lessee of liability for royalty due on production in the event of default by the operator. Jerry Chambers Explor Co., 107 IBLA 161 (1989).

8/ A copy of the Eugene Island Block 292 Unit Agreement, approved by the Department May 4, 1966, appears in the case The agreement provides at section 4 that "Forest Oil Corporation is hereby designated as Unit Operator, and * * * agrees consents to accept the duties and obligations of Unit Operator, for the discovery, development and production of Uni Substances * * *." Further, section 8 of the Unit Agreement regarding royalties on unitized substances produced from leases provides that "royalty shall be paid by the Unit Operator."

royalty or other payments required by the lease." 30 U.S.C. § 1702(7) (1982) (emphasis added). 9/ Section 102 of FOGR

provides that:

> A lessee--(1) who is required to make any royalty or other payment under a lease * * * shall make such payments in the time and manner as may be specified by the Secretary; and (2) shall notify the Secretary, in the time and manner as may be specified by the Secretary, of any assignment the lessee may have made of the obligation to make any royalty or other payment under a lease * * *.

30 U.S.C. § 1712(a) (1982). The implementing regulation provides that MMS must be notified within 30 days when the le

or revenue payor assigns any responsibility for payment to any other entity. 30 CFR 218.52(a).

MMS utilizes the PIF for this purpose: "The PIF is used to transmit lease and payor information to the Min

Management Service (MMS). * * * MMS uses the PIF information to establish and maintain the lease and payor acco

required for monthly Report of Sales and Royalty Remittance (Form MMS-2014) reporting." 1 MMS, Royalty Manage

Program, Oil and Gas Payor Handbook § 2.3 (1987). Regarding those events which require filing a PIF, MMS has prov

> A PIF must be filed for each Federal or Indian lease on which royalties * * * are paid to the AFS [Auditing and Financial System]. The payor is required to submit a PIF to establish or revise royalty and rental payment responsibility. Generally, an initial or revised PIF is required when physical, contractual, and operational events occur or conditions are revised regarding a lease, its subdivisions, or its payment responsibilities.

9/ One of the express purposes of FOGRMA was "to clarify, reaffirm, expand, and define the responsibilities and obliga of lessees, operators, and other persons involved in transportation or sale of oil and gas from the * * * Outer Continental Sh 30 U.S.C. § 1701(b) (1982).

> An initial PIF is required to establish reporting and paying responsibilities and a revised PIF is required when data change on any PIF.

Id. at § 2.4.

Although appellant is the agent of the co-lessees for purposes of payment of royalty due on their share of produc we find it inappropriate in the circumstances to allow appellant to deny liability on the ground it is merely an agent fo working interest owners. As unit operator it signed the agreement as a principal. Indeed, the unit operator is in a un position to know what is produced from a lease and what is

delivered for sale as this is its responsibility. Notwithstanding appellant's lack of knowledge of the terms under w production was marketed by the co-lessees, it has access to other information critical to determining the amount of royalty Thus, we find that appellant as unit operator and payor was assigned and accepted the responsibility of making roy payments for its co-lessees and notified the Department of this fact both in submitting the unit agreement and in filin appropriate PIF. In this context, we must affirm the liability of the operator/payor for the royalty on the share of produ attributable to the other working interests. Although this conclusion is strengthened by cited provisions of FOGRMA regulations and procedures implementing this Act, we find this result to be consistent with the obligations assumed by the operator acting as payor prior to FOGRMA. 10/

10/ The legislative history of FOGRMA indicates that the Act was not perceived to grant "the Secretary new authori designate a 'principal
payor' i.e., a single payor legally obligated to make payment for any
royalty obligation on a lease." Rather, "The Committee is allowing the

[2] With respect to the issue of liability for additional royalty on the basis that certain gas sold was not pric accordance with the NGPA ceiling price, we note that this issue was not addressed by the Director's decision. We are u to accept the contention of MMS on appeal that appellant waived this issue on the ground it was not raised before the Director. The issue of liability for incorrectly priced gas is raised in appellant's November 22, 1985, appeal addressed to the Director, MMS, in MMS-85-0326-OCS. One element of appellant's argument regarding liability for royalty owed by co-lessees is the lack of information it had with respect to the sale obtained by co-lessees who marketed their own share of the production. Indeed, where MMS elects to hold the payor li the adequacy of notice to the lessees of the valuation of production for royalty purposes becomes an issue. Section 2(d) c OCS leases in the record provides that:

> (2) It is expressly agreed that the Secretary may establish reasonable minimum values for purposes of computing royalty on products obtained from this lease, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, or area, to the price received by the lessee, to posted prices, and to other relevant matters. Each such determination shall be made only after due notice to the lessee and a reasonable opportunity has been afforded the lessee to be heard. [Emphasis added.] [11/]

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fn. 10 (continued)
Secretary the discretion to determine under existing authority of law which person (i.e., lessee, interest holder, operator, is responsible for making royalty payments to the United States." H.R. Rep. No. 859, 97th Cong., 2nd Sess. 28, reprint 1982 U.S. Code Cong. & Admin. News 4268, 4282.

11/ In this regard, section 14 of the Eugene Island Block 292 Unit Agreement provides that the Unit Operator shall,
"after notice to other parties affected, have the right to appear for and on behalf of any and all interests affected he before the Department of the Interior, and to appeal from orders issued under the

It is not clear from the record that MMS notified the lessees other than appellant of the royalty valuation determination made in the audit. Hence, we set aside and remand the Director's decisi the extent it affirmed the royalty assessment on the basis of incorrect pricing to allow appellant and the other lessees to res to the findings regarding valuation of production.

[3] With respect to the overpayments of royalty which were the sub-ject of the subsequent alleged unautho recoupments taken by appellant on Form MMS-2014, we believe the precedents established in Mobil Oil Corp., 65 IBLA 295 (1982), and Shell Oil Co., s are relevant. In the lead case, Shell Oil Co., we dealt with the question of whether, in the circumstances of an audit of ro payments on a lease account, overpayments disclosed in the audit may be allowed as an offset to underpayments disclos the audit notwithstanding the fact that the audit was conducted more than 2 years after the overpayment so that a refund w be barred by the terms of section 10 of OCSLA. The Board answered the question in the affirmative:

> Had Shell initiated a request in 1979 for a refund of its November 1974 overpayment, we believe Survey [12/] would have

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fn. 11 (continued)
regulations of said Department * * * provided, however, that any interested party shall also have the right * * * to be hea any such proceeding."
See 30 CFR 250.194 (model unit agreement).
12/ Geological Survey, U.S. Department of the Interior. MMS was created by Secretarial Order No. 3071 dated Jan. 19, 1 to carry out the functions of the Conservation Division of Survey regarding collection of royalty revenue. Secretarial O No. 3071, 47 FR 4751 (Feb. 2, 1982), as amended by Secretarial Order No. 3087 and Amendment No. 1, 48 FR 8983 (M 1983).

> been correct in denying such request as untimely. In Phillips Petroleum Co., 39 IBLA 393 (1979), we so held. Where, however, Survey undertakes to audit a producer some 4 years after the payments at issue have been made, we hold that a sense of fundamental fairness requires Survey to recognize both a producer's underpayments and overpayments of royalty. We believe Survey should have properly offset Shell's underpayment by the amount of its overpayment. We do not believe that the 2-year period of limitations was established to give Survey a procedural advantage in computing royalty payments.

52 IBLA at 78. This precedent was further developed in Mobil Oil Corp., supra.

In the Mobil case the asserted overpayments which appellant sought to offset were discovered by the lessee rather by Survey in the audit. The Board found this distinction immaterial: "The question then, is not whether the statute bars ref or credits, but whether--assuming overpayments occurred--Survey should have recognized and offset these in the same period in which it discovered and assessed underpayment." 65 IBLA at 304. The Board answered this question i affirmative and remanded the case to allow Survey to determine the extent of any allowable offsets. The scope of our ho was defined further by the concurring opinion wherein we recognized the past practice of permitting offsets and declin invalidate this past practice:

> It is true that, in the past, Survey has permitted the off-setting of overpayments in one month by deductions from subsequent payments in future months. Our decision herein does not invalidate this practice. It does, however, properly limit it to the 2-year period mandated by 43 U.S.C. § 1339(a) (1976). In other words, where a lessee made royalty payments for any month in excess of that required by law, the excess may be deducted from future royalty payments provided that the excess payment occurred within 2 years of the future payment. Where, however, an excess

> payment has not been discovered within this 2-year period, such payment may not be recouped by diminution of future payments owing from production in the lease. Indeed, allowance of such deduction would be directly contrary to the 2-year limitation on refunds which Congress has expressly imposed. [Emphasis in original; footnote omitted.]

65 IBLA at 305-06 (Burski, A.J., concurring). 13/

Subsequently, MMS issued the Oil and Gas Payor Handbook referred to previously. Effective August 1, 1983 Handbook was amended to specifically provide that a "payor cannot recoup an overpayment on an OCS lease through entries to Form MMS-2014 wit receiving prior approval from MMS." Payor Handbook Addendum No. 4, page 3 of 5 (July 1983); see 2 MMS, Ro Management Program, Oil and Gas Payor Handbook § 4.4.2 (1986). In the absence of an MMS audit, the Board has up MMS decisions applying this provision to disallow recoupments of overpayments on Form MMS-2014 without authorization. E.g., Mesa Petroleum Co., 107 IBLA 184 (1989); Kerr-McGee Corp., 103 IBLA 338 (1988). Howeve appeal in this case is filed from a decision after audit refusing to consider the overpayments which were the subject o recoupments as an offset to underpayments disclosed by the audit rather than from a decision disallowing an unautho recoupment. 14/ In the context of the appeal of the audit the issue is

13/ The concurring opinion also found that offsetting can only be allowed within the context of a single lease. 65 IBLA at This finding has been upheld by the Board in subsequent cases. E.g., Mobil Oil Exploration & Producing, S.E., 104 IBLA 401 (1988).

14/ Indeed almost the entire audit period preceded the August 1983 effective date of the Handbook change. The prior prac as noted in the Mobil concurring opinion, was to allow recoupment.

what, if any, additional royalty is due the lessor. 15/ Accordingly, we find it necessary to set aside and remand the Direc decision for fur-ther consideration of those overpayments which may offset the underpayments at issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 4.1, the decision of the

Director, Minerals Management Service, is affirmed in part, set aside in part, and remanded for further action pursuant to decision.

_____
C. Randall Grant, Jr.
Administrative Judge

I concur:

_____
Gail M. Frazier
Administrative Judge

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15/ In this regard, the present case is distinguishable from those involving an assessment for erroneous reporting or a penalty for failure to properly pay royalty when due.